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10 UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF WASHINGTON

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 MARK WELLINGTON GILBERT,

16 Defendant.

Case No. 4:17-CR-6045-SAB

United States' Sentencing
Memorandum

October 13, 2022 – 11:00 AM

17 Plaintiff United States of America, by and through Vanessa R. Waldref, United
18 States Attorney for the Eastern District of Washington and Dan Fruchter and Brian M.
19 Donovan, Assistant United States Attorneys, hereby respectfully submits its
20 Sentencing Memorandum in response to the Draft Presentence Investigation Report
21 (PSR) (ECF No. 163) submitted by United States Probation Officer Carrie A.
22 Valencia on August 26, 2022.

23 **1. Factual Background**

24 On November 21, 2017, the United States Attorney for the Eastern District of
25 Washington returned an Indictment charging Defendant MARK WELLINGTON
26 GILBERT (Defendant) with Bank Fraud in violation of 18 U.S.C. § 1344(2). ECF No.
27 1; PSR, ¶ 1. Defendant was arraigned on January 29, 2018. ECF No. 11; PSR, ¶ 2. A
28 superseding indictment was returned on June 4, 2019 charging Defendant with four
UNITED STATES' SENTENCING MEMORANDUM - 1

1 counts: Bank Fraud, in violation of 18 U.S.C. § 1344(2) (count 1); Aggravated
2 Identity Theft, in violation of 18 U.S.C. § 1028A(a)(1), (c)(4) (counts 2-3); and
3 Making a False Declaration in Relation to a Bankruptcy Case, in violation of 18
4 U.S.C. § 152(3) (count 4). ECF No. 80. Defendant was arraigned on the superseding
5 indictment on August 1, 2019. ECF No. 90; PSR, ¶ 4. On April 20, 2022, pursuant to
6 a Fed. R. Crim. P. 11(c)(1)(C) Plea Agreement between the United States and the
7 Defendant, an Information Superseding Indictment was filed charging Defendant with
8 one count of Fraud in Connection with an Identification Document or Authentication
9 Feature, in violation of 18 U.S.C. § 1028(a)(6). ECF No. 154; PSR, ¶ 5. That same
10 day, April 20, 2022, Defendant pled guilty to the sole count of the Information. ECF
11 No. 155; PSR, ¶ 6.

12 In June 2014, Defendant and his spouse filed for Chapter 11 bankruptcy, which,
13 in August 2014, was converted into a Chapter 7 proceeding, and which remains
14 ongoing. PSR, ¶¶ 18-20, 49, 96. In advance of filing for bankruptcy, Defendant sought
15 and obtained a mortgage to purchase a \$750,000 home in Hawai'i under the name of
16 the Bruce Gilbert and Priscilla Gilbert 1998 Trust—a trust named for his parents and
17 for which his parents were the beneficiaries. PSR, ¶ 29. Although the Hawai'i home
18 was purportedly purchased for his parents, the down payment was financed largely
19 with Defendant's funds, Defendant and his family lived in the home, and Defendant
20 made a number of monthly mortgage payments. *See* Plea Agreement, p. 5; PSR, ¶¶ 23,
21 28, 31, 33, 38, 41-42. Defendant did not disclose either the home or his funds with
22 which the home was purchased as assets in his bankruptcy filings. PSR, ¶¶ 43-44.
23 Whether the home was purchased for Defendant or his parents, Bruce and Priscilla
24 Gilbert, remains contested. *See* Plea Agreement, p. 5; PSR, ¶¶ 29, 33, 37-41.

25 Uncontested, however, is that in the course of obtaining a mortgage to purchase
26 the property, Defendant sent the lender—Hawaii Community Federal Credit Union—
27 statements purportedly documenting Bruce Gilbert's retirement account at the close of
28

1 FY 2014 Quarters 1 and 2. Plea Agreement, p. 4; PSR, ¶ 30. These statements showed
2 balances of \$1,208,245.52 and \$1,211,918.60 at the close of each respective quarter.
3 PSR, ¶ 30. They also bore the last four digits of Bruce Gilbert's Social Security
4 Number. *Id.* In fact, Bruce Gilbert had no such retirement account, although
5 Defendant did—carrying balances precisely \$1,000,000 less than those indicated on
6 the statements. *Id.* The lender, Hawaii Community Federal Credit Union, relied on
7 these fraudulent statements when deciding to approve Bruce and Priscilla Gilbert's
8 mortgage. PSR, ¶ 30. Despite Defendant's misrepresentation, however, Hawaii
9 Community Federal Credit Union has suffered no loss to date as a result. *See* PSR, ¶
10 54.

11 Defendant's use of fraudulent documentation to purchase the Hawai'i home
12 relates to his failure to make required disclosures in bankruptcy. Defendant's
13 retirement account—the statements for which showed a balance \$1,000,000 less than
14 the falsified statements—was liquidated in June 2014. PSR, ¶¶ 30, 36. Defendant
15 received a check for the balance of the account in the amount of \$144,171.30 on June
16 18, 2014. PSR, ¶ 30. Eight days later, Defendant obtained a cashier's check for
17 \$143,379.33, which he used to pay over half of the down payment on the Hawai'i
18 home.

19 According to the bankruptcy Trustee, as soon as Defendant liquidated his
20 retirement fund, he was required to disclose funds in the bankruptcy proceeding. PSR,
21 ¶ 43. Defendant did not do so. *Id.* Moreover, Defendant made monthly payments on
22 the fraudulently-obtained mortgage using additional funds that should have been
23 disclosed in bankruptcy. *Id.* Whether or not Defendant purchased the Hawai'i home
24 for his personal use, he submitted fraudulent documentation to obtain the mortgage
25 and did not disclose required assets in the bankruptcy proceeding.

26 **2. Review of PSR and Guidelines Calculation**

27 The United States has reviewed the Presentence Investigation Report prepared

1 by Probation Officer Carrie A. Valencia, and is of the view, based upon information
2 that is presently available, that the Presentence Report is factually complete and
3 accurate in all material respects. The United States agrees that the base offense level is
4 6 pursuant to U.S.S.G. § 2B1.1(a)(2) and should be increased to 10 pursuant to
5 U.S.S.G. § 2B1.1(b)(9)(B) (offense involved “a misrepresentation or other fraudulent
6 action during the course of a bankruptcy proceeding”). PSR, ¶¶ 52, 55. This
7 enhancement is merited because the Defendant used the funds that he improperly
8 failed to disclose in bankruptcy as the majority of the down payment to purchase the
9 Hawai’i home. *See United States v. Tanke*, 743 F.3d 1296, 1306-07 (9th Cir. 2014)
10 (construing relevant conduct broadly for the purposes of a § 2B1.1(b)(9)(B)
11 enhancement). The United States further agrees that Defendant should receive a 2-
12 level reduction for acceptance of responsibility, for a total offense level of 8. PSR, ¶¶
13 61-62. Based on Defendant’s Criminal History Category of I, the relevant sentencing
14 guideline range is 0-6 months.

15 **3. Sentencing Recommendation**

16 The Court must consider all of the sentencing factors set forth in § 3553(a) in
17 determining Defendant’s sentence. Those factors include: (1) the nature and
18 circumstances of the offense and the history and characteristics of the defendant; (2)
19 the need for the sentence imposed to reflect the seriousness of the offense, to promote
20 respect for the law, and to provide just punishment for the offense; (3) the need to
21 afford adequate deterrence to criminal conduct, and to protect the public from further
22 crimes of the defendant; (4) the need to provide the defendant with educational or
23 vocational training, medical care, or other correctional treatment in the most effective
24 manner; (5) the guidelines and policy statements issued by the Sentencing
25 Commission; (6) the need to avoid unwarranted sentencing disparities among
26 defendants with similar records who have been found guilty of similar conduct; and
27 (7) the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a).

1 Here, Defendant has no criminal history. Defendant had been a successful
2 businessman before falling on difficult financial times and declaring bankruptcy, and
3 is now again working in his field of expertise and presumably paying off his creditors.
4 PSR, ¶¶ 19, 82. Moreover, Hawaii Community Federal Credit Union experienced no
5 loss as a result of Defendant's misrepresentation. However, Defendant's crime
6 remains serious: fabricating \$1,000,000 worth of assets is a material misrepresentation
7 in the course of seeking a mortgage, and that Defendant used his father's Social
8 Security Number to augment the authenticity of the falsified documents adds to the
9 seriousness of the crime. Such conduct carries enormous risk both to the lender as
10 well as to the borrower.

11 Balancing the above factors, and consistent with the Fed. R. Crim. P.
12 11(c)(1)(C) plea agreement, the United States recommends a three-year sentence of
13 probation, a \$13,362 fine, and a \$25 special penalty assessment.

14 A sentence of probation falls within the statutory guideline range. While there is
15 no loss from the offense of conviction, and therefore no restitution is due at this time
16 in this case, a sentence of probation will allow Defendant to continue to earn money
17 and to pay his other creditors and debts. Defendant has likely already been specifically
18 deterred from repeating such conduct by the hardship that this case has brought him
19 and his family. *See* PSR, ¶¶ 81-82, 88.

20 A three-year probationary period, if imposed pursuant to the financial
21 conditions in the plea agreement, will specifically address the nature of Defendant's
22 crime.

23 A \$13,362 fine represents the cost of supervision by a probation officer for
24 three years. *See* PSR, ¶ 106. Although this figure is greater than the Guideline
25 suggested maximum of \$10,000, it falls far below the statutory maximum of \$100,000
26 and fairly represents the cost imposed on the Government by Defendant's conduct.
27 Defendant appears to be able to afford to pay such a fine: although there is no current
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1 evidence before the Court regarding Defendant's ability to pay, he seems to have
2 remained well-heeled despite his bankruptcy. See PSR, ¶ 45 (noting that Defendant
3 rented a residence costing \$5,500 per month from 2015-2016).

4 Last, the United States notes that the plea agreement includes a forfeiture
5 provision regarding the Hawai'i home purchased with the fraudulently-obtained
6 mortgage. The United States and the relevant parties are finalizing an agreement for a
7 stipulated forfeiture sale of the Hawai'i home. The United States believes that this
8 forfeiture agreement is essential to an equitable resolution.

9 In sum, the United States submits that its proposed resolution appropriately
10 balances the section 3553(a) factors, including the nature and circumstances of the
11 offense and the history and characteristics of the defendant as well as the seriousness
12 of the offense. The United States further submits that the jointly recommended
13 sentence is sufficient, but no greater than necessary, after balancing all of the relevant
14 factors.

15 Dated: September 28, 2022.

16 Vanessa R. Waldref
17 United States Attorney

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19 Dan Fruchter
20 Brian M. Donovan
21 Assistant United States Attorneys

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27 **CERTIFICATE OF SERVICE**

1 I hereby certify that on September 28, 2022, I electronically filed the foregoing
2 with the Clerk of the Court using the CM/ECF system which will send notification of
3 such filing to the following:

4 Colin G. Prince
5 10 North Post, Suite 700
6 Spokane, WA 99201



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8 Dan Fruchter
9 Assistant United States Attorney
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